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No. 10-398

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

CELLCO PARTNERSHIP
D/B/A VERIZON WIRELESS,

Petitioner,

v.

KEITH LITMAN, ET AL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

This case presents the Court with a unique opportunity to put to rest the difficult set of issues raised by the intersection of the FAA with state contract law. Those issues have been briefed and argued before the Court in *Concepcion* and this case presents an ideal companion case to *Concepcion*. It focuses on a different part of Section 2 of the FAA to arrive at a more textually based and more easily applied resolution of the preemption issue.

Even if this case were not independently worthy of the Court's attention, it would have to be held in light of *Concepcion*. The overarching legal issue in the two cases—whether the FAA preempts state unconscionability law that nullifies bilateral arbitration clauses—is identical as between the two cases. Indeed, Respondent concedes as much, noting the factual and legal identity of this case to *Concepcion*.

I. Respondents Concede That The Petition Satisfies The Rule 10 Standard For Granting Certiorari.

As Petitioner has explained, and Respondents have conceded, this case and *AT&T Mobility LLC v. Concepcion*, No. 09-893, are virtually identical cases presenting the same question of federal law. *See* Pet. at 11-12; Opp. at 1 ("[T]his case is substantially factually identical to *Concepcion* and closely tracks the legal arguments raised there.").[1] The question in each case is whether the FAA preempts States from conditioning the enforcement of arbitration agreements on the

1. References to "Opp." are to Respondents' brief in opposition; references to "Pet." are to the petition.

availability of class-wide arbitration. *See* Pet. at i; Opp. at 1 ("The Court has already granted certiorari, and heard oral argument . . . in [*Concepcion*] on the issue whether the FAA preempts generally applicable state contract law providing that a class action ban in an arbitration agreement can be unconscionable and unenforceable in certain circumstances."). Indeed, the bulk of Respondents' Opposition addresses the merits of this question. Respondents argue at length that the New Jersey Supreme Court in *Muhammad*—which itself is derivative of the *Discover Bank* case at issue in *Concepcion*, *see* Pet. at 11-12—applied generally applicable unconscionability principles in finding a class-action waiver unenforceable. Opp. at 15-24. As Petitioner has explained, Respondents' argument lacks merit. *See* Pet. at 22-30. But in any event, the similarities between this case and *Concepcion* dictate that the Court should at a minimum hold the petition pending its decision in *Concepcion*. *See Stutson v. United States*, 516 U.S. 163, 181 (1996) (Scalia, J., dissenting) ("We regularly hold cases that involve the same issue as a case on which certiorari has been granted[.]").[2]

2. Numerous federal district courts have recognized the strong identity of issues between this case and *Concepcion* and have stayed further proceedings in cases involving Verizon Wireless's arbitration clause pending this Court's ruling in *Concepcion*. *See, e.g.*, *Homa v. Am. Express Co.*, No. 06-2985, 2010 WL 4116481, at *8 (D.N.J. Oct. 18, 2010) ("Advancing this litigation while the issue of FAA preemption/preclusion with respect to voiding class-arbitration waivers based upon state law unconscionability principles—an identical, and dispositive, issue in *Homa*, *Litman*, and *Concepcion*—is squarely before the Supreme Court may be an exercise in futility."); *see also* Order at 2, *Sobel v. Cellco P'ship*, No. 10-CV-3312 (D.N.J. Oct. 29, 2010) ("[B]ecause the issues in contention in *Concepcion*

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II. This Petition Should Be Granted So That The Court May Consider The Full Extent Of FAA Preemption And Ensure Proper Resolution Of The Question Presented Here And In *Concepcion*.

The petition should be granted to allow the Court to consider the full sweep of Section 2 preemption and thus ensure proper resolution of the preemption question before the Court in this case and in *Concepcion*. As explained *supra*, both this case and *Concepcion* present the question whether the FAA preempts States from conditioning the enforcement of arbitration agreements on the availability of class-wide arbitration. And both this case and *Concepcion* focus on the text of the savings clause in Section 2 of the FAA, which preserves state law that serves as a ground "for the revocation of any contract." But *Concepcion* focuses principally on only one requirement of the savings clause ("any contract"), whereas this case focuses on both of Section 2's requirements ("revocation" and "any contract"). Thus, this case presents the Court with the opportunity to consider the entirety of Section 2's savings clause and the full scope of Section 2 preemption. And because state law must be both a ground for "revocation" and applicable to "any contract" in order to avoid the preemptive sweep of Section 2, consideration of both requirements may be necessary for a final resolution of the FAA preemption question

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are similar to the case at bar, the outcome of that case may substantially affect or be dispositive of this action."). At a minimum, a hold of this petition is necessary to ensure that the Third Circuit may apply this Court's guidance in *Concepcion* to the numerous similar cases pending within its jurisdiction.

presented here and in *Concepcion*. A grant of certiorari thus is warranted.

As shown in the Petition, the proper construction of the term "revocation" applies only to those state laws that deal with the circumstances surrounding the making of the contract (such as fraud, duress, or "procedural" unconscionability) and not to notions of "substantive" unconscionability that the court below and in *Concepcion* applied to invalidate otherwise valid arbitration clauses. This construction of the term "revocation" would resolve the question presented in these cases in a manner faithful to the text, structure, and history of the FAA, and it would provide an administrable rule for the lower courts. Perhaps more importantly, properly construing the term "revocation" would permit the Court to avoid the line drawing necessitated by the "any contract" requirement of Section 2's savings clause (and the case-by-case litigation it is likely to produce). *See, e.g.*, Hr'g Tr. at 35:6-10, Nov. 9, 2010, *AT&T Mobility v. Concepcion*, No. 09-893 ("How would you propose to distinguish between facially neutral contract law defenses that implicitly discriminate against arbitration and those that do not? What's the test you would use to tell the difference between the two?") (Sotomayor, J.).[3]

Respondents do not dispute that this case is an appropriate vehicle for considering the "revocation"

3. Respondents in *Concepcion* conceded at argument that the "any contract" language in Section 2 preempts States from applying facially neutral contract-law defenses in a way that discriminates against arbitration. *See, e.g.*, Hr'g Tr. at 35:17-19, Nov. 9, 2010, *AT&T Mobility v. Concepcion*, No. 09-893 ("The

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requirement of Section 2. Instead, Respondents attempt to engage on the merits of this issue of statutory construction, implicitly conceding that this issue is both properly presented and worthy of review. *See* Opp. at 24-32.

However, Respondents do not dispute that, as a matter of standard canons of statutory construction, the Section 2 term "revocation" must have a distinct meaning. That is, Congress's use of three adjectives in Section 2 to describe the status of arbitration agreements under federal law—"valid, irrevocable, and enforceable"—but only the one noun "revocation" (which has the same root as "irrevocable") in the savings clause means that grounds for "revocation" do not include those grounds that relate to "valid[ity]" or "enforceab[ility]."[4] Nor do Respondents deny that the meaning of the term "revocation" is tied to the "making" of the agreement to arbitrate under Section 4 of the

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Court says this is facially nondiscriminatory law, it's generally applicable, but there's a limit on that."). The only point of contention with regard to this argument is over where to draw the line between applications of facially neutral contract law that discriminate against arbitration and those that do not. *Id.* at 35:6-10.

4. *See Conn. Dep't of Income Maint. v. Heckler*, 471 U.S. 524, 530 n.15 (1985) ("It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute."). Respondents' assertion that there is an "unbroken linkage of invalidity, unenforceability and revocability—including substantive unconscionability—under § 2," *see* Opp. at 28, is thus inconsistent with the clear text of Section 2.

FAA. *See* Pet. at 15-16.[5] Indeed, Respondents do not even bother to consider the text or structure of the FAA at all.

Likewise, Respondents do not dispute that the decisions of multiple courts (including this one) support the construction of the term "revocation" as referring to grounds for invalidating a contract that relate solely to the procedural circumstances surrounding its formation. *See* Pet. at 16-17 (discussing *Nat'l R.R. Passenger Corp. v. Consol. Rail Corp.*, 892 F.2d 1066, 1070 (D.C. Cir. 1990), *Supak & Sons Mfg. Co. v. Pervel Indus., Inc.*, 593 F.2d 135, 137 (4th Cir. 1979), and *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)). In particular, Respondents ignore the fact that Petitioner's construction of this key statutory term is consistent with not only the text of the FAA, but also this Court's repeated admonition that fraud and other procedural defects are the type of grounds that survive Section 2 preemption. *See Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987) ("Absent a well-founded claim that an arbitration agreement resulted from the *sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract,'* the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability.'") (quoting *Mitsubishi Motors Corp. v.*

5. Respondents' contention that the "failure to comply therewith" language in Section 4 "obviously implicates issues of 'validity' and 'enforceability,'" Opp. at 28-29 n.3, makes no sense at all. This language relates solely to the parties' performance of the arbitration agreement, an issue that is immaterial to this case.

Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985)) (emphasis added); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Rodriguez de Quijas v. Shearson/A[illegible]. Express, Inc.*, 490 U.S. 477, 483-84 (1989); *Prim[illegible]aint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967).

Instead, Respondents advance three weak merits arguments. First, Respondents argue that Petitioner's construction of the term "revocation" is contrary to this Court's decisions in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), *Perry v. Thomas*, 482 U.S. 483 (1987), and *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996). But none of these decisions even purports to construe the meaning of the term "revocation."

The Court in *Rent-A-Center* had no reason to confront this interpretive issue as it was immaterial to the question presented. The relevant question was whether Jackson's unconscionability arguments went to the enforceability of the delegation provision or the arbitration agreement as a whole, not whether (and to what extent) unconscionability defenses are preempted by the FAA. *See Rent-A-Center*, 130 S. Ct. at 2775. Similarly, the *Perry* Court "decline[d] to address [the] claim that the arbitration agreement in this case constitutes an unconscionable, unenforceable contract of adhesion" because the issue was not resolved in the lower court. 482 U.S. at 492 n.9.[6]

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6. *Perry*'s statement, in a footnote, that "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and

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Finally, although *Doctor's Associates* states that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2," 517 U.S. at 687, this statement was no part of the holding in that case. Indeed, the Court rested its decision on the "any contract" language of Section 2; it made no effort to divine the meaning of the term "revocation" in Section 2. *Id.* And, in any event, given that the issue in that case related to a Montana notice requirement for arbitration agreements, to the extent that *Doctor's Associates* concerns unconscionability at all, it is best understood as a "procedural unconscionability" case, as it relates to the making of an arbitration agreement. These cases thus are consistent with the text of the FAA and the precedent relied upon by Petitioner. *See* Pet. at 14-22.[7]

Second, Respondents argue that "the legislative history of the FAA contradicts Petitioner's" theory of preemption. Opp. at 29. However, Respondents rely on

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enforceability of contracts generally," 482 U.S. at 492 n.9, was immaterial to that case and cannot in any event be reconciled with the plain text of Section 2. *See supra* note 4 and accompanying text.

7. To the extent that the lower courts might (mis)read any of these cases as foreclosing the construction of the term "revocation" advanced by Petitioner, this would stunt any further development of the jurisprudence on this issue. Such a risk counsels against a decision to delay considering the issue until such time as the lower courts have more thoroughly analyzed it.

only one passage from the FAA's legislative history—a passage that sets out a basis for the theory that the FAA is a procedural, rather than preemptive, statute. But this Court has already rejected that position based upon its interpretation of the FAA as a whole. *See Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (holding that the FAA "creat[ed] a substantive rule applicable in state as well as federal courts," and that "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements").

Third, Respondents argue that an arbitration agreement can be "disregarded" for "overreaching," and they cite a New Jersey case, *Sitogum Holdings, Inc. v. Ropes*, 352 N.J. Super. 555 (N.J. Super. Ct. 2002), for the proposition that "overreach" means "substantive unconscionability." *See* Opp. at 31-32. But Respondents misinterpret the term "overreach." At the time of the FAA's enactment, "overreach" meant to defraud, not merely to strike an unfair bargain. *See* The Century Dictionary and Cyclopedia 4204 (1906) ("Overreach 1. To overtake. 2. To reach beyond in any direction; rise above; extend or go beyond. 3. To deceive by cunning, artifice, or sagacity; cheat; outwit. 4. To reach or stretch too far."). Respondents' reference to *Sitogum Holdings*, which does not even define "overreach," is simply off the mark.[8] In any event, none of Respondents'

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8. Respondents' arguments regarding the contemporaneous authorities cited by Petitioner are inapposite. *See* Opp. at 31 (citing *Zimmerman v. Cohen*, 236 N.Y. 15, 19-20 (1923)). That a party to an arbitration agreement can waive its right to compel arbitration by choosing to litigate is not at issue.

arguments detract from Petitioner's construction of the text and structure of the FAA, which Respondents do not even bother to address.

In sum, the petition presents the Court with an opportunity to resolve the thorny issues surrounding FAA preemption of state unconscionability law with a clear line rooted in the text of the FAA itself. If the concept of "revocation" in the FAA's savings clause limits the grounds upon which courts can invalidate arbitration clauses to formation defects, then doctrines like substantive unconscionability or alleged conflict with "public policy" simply do not apply. This Court would not be obligated to wade into state unconscionability law to determine whether it has been applied in an even-handed manner, because substantive unconscionability would be *categorically excluded* from the contract defenses preserved by the FAA's savings clause. That result, rooted in the text and history of the FAA, and amenable to straightforward administration by the lower courts, is the correct result in both this case and *Concepcion*.

CONCLUSION

For the foregoing reasons and those set out in the petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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